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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ISRAEL VASQUEZ, Defendant and Appellant.	E047903 (Super.Ct.No. FVI08494) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

David M. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

After we reversed his original first degree murder conviction and remanded this matter for a new trial in case No. E032927, a second jury found defendant and appellant, Israel Vasquez (hereafter defendant), guilty of first degree murder and also found true the special circumstance allegations that defendant committed the murder while lying in wait and to prevent the victim, Mary Schultz, from testifying in a criminal proceeding (Pen. Code, § 190.2, subds. (a)(15) & (10)). The jury also found true the special allegation that in the commission of the crime defendant personally used a dangerous and deadly weapon, namely a knife. The trial court sentenced defendant to state prison for a determinate term of one year on the personal use allegation followed by the prescribed indeterminate term of life without the possibility of parole.

In this appeal, defendant contends (1) he was denied the right to testify at trial in violation of the Sixth Amendment to the United States Constitution; (2) he was denied his state and federal constitutional right to a speedy retrial; (3) the trial court committed prejudicial error by failing to give certain accomplice jury instructions sua sponte, and by giving CALJIC No. 2.11.5 regarding the testimony of unprosecuted accomplices; (4) the evidence is insufficient to support the special circumstance that defendant killed the victim to prevent her from testifying in a criminal proceeding; and (5) he was denied his right to the effective assistance of counsel, first, because his trial attorney did not ask defendant whether he wanted to testify at trial and, next, because his trial attorney did not adequately prepare for or conduct defendant's trial.

For reasons set out in detail below, we conclude defendant's claims are meritless and therefore we will affirm the judgment.

FACTS

A detailed recitation of the facts of the crime is not essential to our resolution of the claims defendant raises on appeal. Briefly stated, in late 1997, defendant claimed that Daniel Ammerman owed him money for drugs. When defendant's collection efforts turned violent, Ammerman reported him to the police and defendant was charged with assault on Ammerman's father. Defendant subsequently threatened Ammerman in the presence of Ammerman's girlfriend, Mary Schultz. Both Schultz and Ammerman reported the threats to the prosecutor in the assault case, who unsuccessfully attempted to have defendant remanded into custody or to have his bail increased. Ultimately, defendant and Thomas Weatherwax forced their way into the house where Ammerman and Schultz lived. Defendant cornered Schultz in a bedroom where her children were sleeping and stabbed her repeatedly. According to the pathologist, Schultz had 17 stab wounds that included a slit throat and a deep wound to her abdomen from which her intestines were protruding. Either the neck wound or the abdominal wound would have been fatal.

Additional facts pertinent to the issues defendant raises on appeal will be recounted below.

DISCUSSION

We first address defendant's claim that he was denied his right to testify in his own defense.

1.

RIGHT TO TESTIFY AT TRIAL

In a motion for new trial, defendant claimed, among other things, that he told his trial attorney he wanted to testify at trial but his attorney rested without giving defendant the opportunity to exercise that right. At the hearing on defendant's new trial motion, defendant's trial attorney, Mr. Belter, testified in pertinent part that he and the defense investigator, Mr. Braun, had a number of conversations with defendant regarding whether defendant wanted to testify. Mr. Belter stated if defendant had said he wanted to testify, defendant would have testified at trial. Mr. Belter added, "[Defendant] is a very verbal guy . . . he oftentimes spoke his mind in the proceedings. I don't believe that there's any way that I could tell the Court that [defendant] was not going to testify if in fact his decision was to testify. He would have made it very clear that that was not his wish." The trial court, in denying defendant's new trial motion, confirmed Mr. Belter's impression of defendant: "There's absolutely no doubt in my mind as strong a personality as [defendant] is that had Mr. Belter attempted to proceed with the trial without his testifying and he wanted to testify that I would have heard about it. There is no doubt in my mind that I would have heard about it; I didn't. And so in terms of that I

have to go back and say that Mr. Belter was correct that that was a conscious decision on their part for him not to testify."

Despite the above quoted comments, defendant points out that at trial Mr. Belter indicated, both before he presented the defense case and before he rested, that he needed briefly to confer with defendant in order to confirm defendant's decision on whether he would testify. Defendant argues in this appeal that because the record does not affirmatively demonstrate whether Mr. Belter actually had that conversation with defendant, we must assume that it did not occur. From the assumed fact that the conversation did not occur defendant contends we must further assume that defendant intended to testify at trial and was denied that right. We are not inclined to make the requested assumptions, for reasons we now explain.

The pertinent legal principles are well settled. A criminal defendant has an absolute right to testify in his own defense, even over the objection of his attorney. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1198.) "Although tactical decisions at trial are generally counsel's responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel. [Citations.]" (*Ibid*.) A trial court, however, has no duty to advise the defendant of the right to testify or to obtain an express waiver of that right on the record. (*People v. Alcala* (1992) 4 Cal.4th 742, 805-806.) "When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then

seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.'" (*Ibid*.)

There is no reason in this case to deviate from the above quoted principle. Defendant did not state his desire to testify on the record and therefore may not now claim on direct appeal that he was denied that right.

Defendant's claim fares no better when raised as an ineffective assistance of counsel claim. In order to prevail on a claim of ineffective assistance of counsel, defendant must demonstrate both deficient performance by trial counsel and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Dennis* (1998) 17 Cal.4th 468.)

Just as a trial court has no obligation to obtain from the defendant an express waiver of the right to testify, defense counsel is not required to place on the record during trial the fact that he has discussed the issue with defendant. Defense counsel stated at the hearing on defendant's new trial motion, as quoted above, that he spoke with defendant and that defendant confirmed his decision not to testify at trial. We cannot infer from a silent trial record the fact defendant urges, namely that his attorney did not consult with him before resting the defense case and thereby prevented defendant from testifying in his own defense. The consultation in question could have occurred very quickly at counsel table, or it could have occurred during a brief recess in the proceedings.[1] In any

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[1] Defendant suggests that he might have missed the conversation because he is hard of hearing, as he purportedly informed the trial court. The validity of this assertion is belied first by defendant's failure to include a citation to the record to support his claim

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event, despite his claim that he intended to testify at trial, defendant has failed to demonstrate that trial counsel's performance was deficient. The trial court expressly rejected defendant's assertion and in doing so noted that defendant would not have remained quiet if he had wanted to testify. For each of the reasons stated, we reject defendant's claim that he was denied his right to testify in his own defense.

2.

RIGHT TO A SPEEDY TRIAL

Defendant contends on remand following our reversal of his first murder conviction that his retrial was delayed unreasonably and the delay violated his right to a speedy trial guaranteed by the Sixth Amendment to the federal Constitution. According to defendant, the delays that resulted in his trial being continued from April 6, 2005, when the remittitur on his prior appeal was received in the trial court, to December 3, 2007, when the trial court swore in the panel of prospective jurors, began when a judge denied Penal Code section 987.9 funds to his trial attorneys. That issue was resolved when this court apparently issued a writ directing the trial court to provide funds to defendant, but the initial denial of funds effectively caused defense counsel to be three months behind in their trial preparation. Then defendant's two trial attorneys were

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that he informed the trial court that he had a hearing impairment. In addition, the trial court put on the record at the conclusion of the hearing on defendant's motion for new trial the trial court's "impression" that defendant "is feigning that he has hearing problems. He has a possible vehicle on appeal. And I'm speaking to the Court of Appeal now by saying that this Court has determined and is determining that he's malingering and is feigning some type of hearing problem."

relieved of their duty to represent defendant due to a claimed conflict of interest with defendant the nature of which neither attorney would reveal. Additional delay resulted from the trial court granting a "myriad" of continuances for a variety of reasons, some of which defendant acquiesced to by waiving time, and others of which the trial court found were based on good cause. The details of the various continuances are set out at length in the parties' respective briefs. Therefore, we will not recount those details here.

Four considerations are pertinent in determining whether a defendant's right to a speedy trial under the federal constitution has been violated: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." (*Doggett v. United States* (1992) 505 U.S. 647, 651 (*Doggett*), citing *Barker v. Wingo* (1972) 407 U.S. 514 (*Barker*).)

The length of the delay "is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay, [citation] since, by definition, he cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. [Citation.] This latter enquiry is significant to the speedy trial

analysis because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time." (*Doggett*, *supra*, 505 U.S. at pp. 651-652.)[2] By requesting continuances or waiving time, a defendant relinquishes the federal right to a speedy trial. Consequently, those periods are not included in calculating the length of the delay. (*People v. Seaton* (2001) 26 Cal.4th 598, 633-634.)

According to the Attorney General, defendant waived time for almost two years, which leaves only eight months of the total delay subject to speedy trial analysis. Defendant does not dispute the calculation; instead he takes issue with the Attorney General's characterization of defendant's attitude when he waived time.[3] Regardless of his attitude, or the term used to describe it, defendant waived his right to a speedy trial. A waiver given reluctantly, or even under protest, is nevertheless a waiver. The alternative is to refuse to waive time, and thereby insist on the right to a speedy trial.

The eight-month delay at issue here does not meet the threshold set out in *Doggett* to trigger speedy trial review. (*Doggett*, *supra*, 505 U.S. at p. 652, fn. 1 ["Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."].) Presumptive prejudice, as the Supreme Court explained in *Doggett*, stems from the intangible and incalculable impairment to the defense that results from extended delay in bringing a case to trial:

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[2] In *Doggett*, the period of delay between accusation and trial was eight years six months.

[3] According to the Attorney General, defendant "groused" about the continuances but nevertheless waived time.

"[I]mpairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' [Citation.] And though time can tilt the case against either side, [citations], one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria [citation], it is part of the mix of relevant facts, and its importance increases with the length of delay." (*Doggett*, at pp. 656-657.)

Defendant's trial is a retrial following reversal on appeal based on prejudicial juror misconduct, a fact we are compelled to consider in assessing whether the eight-month delay in this case crosses the *Doggett* threshold. Because it is a retrial, the pertinent evidence and testimony, with only limited exception, has been preserved. An eight-month delay in bringing a case to trial in this situation does not have the same presumptively negative effect on the considerations outlined in *Doggett*. We simply cannot say given the circumstances of this case, that the delay in question approached the threshold that requires speedy trial review.

For these reasons we must conclude defendant was not denied his right to a speedy trial.

3.

ACCOMPLICE JURY INSTRUCTIONS

Defendant raises two claims regarding jury instructions. First he contends that the trial court had a sua sponte duty to instruct the jury (a) to view testimony of an accomplice with caution and (b) that it could not convict defendant based solely on the testimony of an accomplice. Defendant's second claim is that the trial court erred by giving CALJIC No. 2.11.5 which is only appropriate when unprosecuted accomplices do not testify at trial. The Attorney General concedes the first claim but contends the error was not prejudicial because the evidence presented at trial amply corroborated the accomplices' testimony. With respect to defendant's second claim, the Attorney General contends there is a conflict in the cases on the issue of whether it is error to give CALJIC No. 2.11.5 when, as in this case, the accomplices testify at trial. But if error, it was harmless in this case. We agree with the Attorney General, for reasons we now explain.

A. Omitted Accomplice Jury Instructions

Four accomplices, along with defendant's wife who was charged with being an accessory after the fact, testified against defendant at trial. As a result of that testimony, the trial court should have instructed the jury on the legal principles set out in Penal Code section 1111 which provides, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An

accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Because four witnesses (Thomas Weatherwax, Chad Byrne, Ricardo Martinez, and Jeffrey Kespert) were accomplices, and each testified against defendant at trial, the trial court should have instructed the jury to view their testimony with caution and also that their testimony must be corroborated. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271.) However, failure to give such instructions "is harmless if there is sufficient corroborating evidence." (*Ibid*.)

There was ample corroborating evidence in this case. The victim's daughter, Leigha, testified in pertinent part that she was in the bedroom when her mother was stabbed to death. Leigha identified defendant as the attacker. The evidence also included the testimony of Sergeant Darryl Heller, a tracking expert employed by the San Bernardino County Sheriff's Department, who testified in pertinent part that he found footprints made by five people[4] that lead to and from a spot around the corner from the victim's house where a car apparently had been parked. Heller testified that a footprint left on the door that had been kicked in on the victim's house matched one of the footprints made by the five people who had been in the car. Thomas Weatherwax testified in pertinent part that he had been in the car with defendant and that he had

[4] Heller testified that one set of tracks was made by Daniel Ammerman, as he ran from the house, presumably as he was being chased by Thomas Weatherwax.

kicked in the door of the house. Sergeant Heller also testified that tire impressions taken from defendant's car matched tire impressions left at the crime scene. The noted evidence amply corroborates the testimony of the various accomplices. Accordingly, the trial court's failure to give accomplice instructions in this case was harmless.

B. CALJIC NO. 2.11.5

The trial court instructed the jury in this case according to CALJIC No. 2.11.5 that, "There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial."

Defendant contends it was error to give this instruction when, as in this case, the accomplices testify at trial. The California Supreme Court said as much in *People v. Cornwell* (2005) 37 Cal.4th 50 (overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390), where, citing the Use Note to CALJIC No. 2.11.5, it held, "A court should 'not use this instruction if the other person is a witness for either the prosecution or the defense.' [Citation.] When an accomplice . . . testifies, the instruction might suggest to the jury that it need not consider the factors it otherwise would employ to weigh the credibility of these witnesses, such as the circumstance that the witness has been granted immunity from prosecution in return for his or her testimony. [Citations.]" (*People v.*

Cornwell, *supra*, at p. 88.) However, the error is harmless when other instructions "adequately directed the jury how to weigh the credibility of witnesses." (*Ibid*.)

In this case, as in *People v. Cornwell*, the trial court instructed the jury according to CALJIC NO. 2.20 about how to assess witness credibility. That instruction told the jury in pertinent part, "Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness including, but not limited to, any of the following: [¶] . . . [¶] The existence or nonexistence of a bias, interest, or other motive." In closing argument, defense counsel pointed out the potential bias and motive to lie on the part of the accomplice witnesses. Defense counsel reminded the jurors that Weatherwax got a deal from the prosecutor that reduced his potential sentence from life in prison without the possibility of parole, to 15 years to life. Defense counsel also reminded the jury that the other three accomplice witnesses each made deals with the prosecutor to "cooperate with the government or cooperate with law enforcement for a prison term of six years."

Defendant contends that the error in this case was not harmless because, among other things, the trial court did not give the accomplice jury instructions, in particular CALJIC No. 3.18, which would have instructed the jurors to view the testimony of an accomplice with caution. Although the trial court's instruction on witness credibility pertained to all witnesses and did not specifically focus on accomplices, it nevertheless

conveyed the pertinent legal principle—in deciding whether to believe any witness the jury should consider whether the witness is biased or has an interest or motive to lie. Moreover, there was evidence in addition to the testimony of the accomplices that tied defendant to the killing. As recounted above in our discussion of the lack of prejudice resulting from the trial court's failure to give accomplice instructions, the evidence included the testimony of the victim's then-six-year-old daughter who identified defendant as the person who stabbed her mother to death. The evidence also included the tracking evidence and the testimony of Mr. Ammerman, the victim's live in boyfriend, that he saw defendant leave the house after the stabbing. This evidence, combined with the trial court's general instruction on witness credibility requires us to conclude that the error in giving CALJIC No. 2.11.5 in this case was harmless in that it is not reasonably probable the jury would have reached a result more favorable to defendant if the error had not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

4.

SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence to support the jury's true findings on the lying-in-wait and crime witness killing special circumstance allegations. In defendant's view the prosecution's evidence did not prove he engaged in a substantial period of watching and waiting, which is an essential element of the lying-in-wait special circumstance. Defendant also contends the evidence does not support the crime witness

special circumstance true finding because there is no evidence the victim witnessed a crime. We disagree.

"To determine the sufficiency of evidence to support a conviction or a special circumstance, 'an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] 'Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, "but our opinion that the circumstances also might reasonably be reconciled with a contrary finding" does not render the evidence insubstantial.' [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 606.) With the foregoing in mind, we review the sufficiency of the evidence to support the jury's special circumstance true findings.

A. Lying in Wait

The lying-in-wait special circumstance "requires 'proof of "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage."' [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 508.) Defendant contends the evidence does not show that he waited and watched for a substantial period of time before attacking and killing Schultz.

Defendant does not dispute the evidence presented at trial. That evidence shows defendant slowly drove by the victim's house and pointed it out to his cohorts. Defendant drove around the block and past the victim's house again. Then he drove around the corner and parked his car at least half a block from the victim's house. Defendant and his companions got out of the car and walked through open desert to a spot across the street from the victim's house. The group stopped there for an unspecified period of time after which defendant and Weatherwax walked across the street. They kicked in the front door of the victim's house, and rushed inside. Defendant then cornered Mary Schultz in her children's bedroom and stabbed her to death.

Defendant contends the noted evidence shows only that he took Schultz by surprise and that he premeditated his crime, but it does not show that he waited and watched for a substantial period of time.[5] Contrary to defendant's apparent view, the

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[5] In his reply brief defendant challenges the accuracy of CALJIC No. 8.81.15, the lying-in-wait special circumstance jury instruction, a claim he contends he first raised in his opening brief. Defendant did not raise the issue in his opening brief. Instead, he quoted the trial court's instruction to the jury that, "The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." Then defendant argued that although the quoted language suggests the special circumstance is established "where the defendant simply premeditated or deliberated the attack, what actually is meant by the instruction is that the period of waiting must *at a minimum* have been of sufficient duration so as to show premeditation and deliberation. It cannot mean that all that is required to render the special circumstance met is that the defendant have deliberated or premeditated, for in that instance there would be no distinction between premeditated first degree murder and a special circumstance killing." In his reply brief defendant contends for the first time that the quoted language is an inaccurate statement of law to the extent it suggests that the period of watching and waiting "need be no greater than that required to show premeditation and deliberation." Issues raised for the first time in a reply brief are viewed as untimely and need not be addressed unless the appellant

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element of surprise results from watching and waiting. In *People v. Hillhouse* (2002) 27 Cal.4th 469, for example, the defendant and the victim were driving in the defendant's truck. The victim asked the defendant to stop after which the victim got out of the truck and urinated. "Immediately thereafter, while the victim was still urinating – and hence particularly vulnerable – defendant attacked from a position of advantage. He took [the victim] by surprise with no opportunity to resist or defend himself." (*Id*. at pp. 500-501.) The Supreme Court found sufficient evidence of watching and waiting to support the lying-in-wait special circumstance from the fact that the defendant waited to stab the victim to death until the victim was in a particularly vulnerable situation and therefore could easily be taken by surprise. (*Ibid*.)

We also do not share defendant's view that the evidence reveals only sufficient time for him to have premeditated and deliberated his action. Therefore, we will not address defendant's assertion that to constitute a substantial period of watching and waiting, the evidence must show that the period of watching and waiting exceeded the time required for the defendant to premeditate and deliberate. From the evidence presented at trial the jury could reasonably infer defendant decided to kill Ammerman and/or Schultz before he drove to their house. Because the evidence supports the inference that defendant premeditated and deliberated the killing before he even arrived at the residence, defendant's act of driving past the victim's house several times, parking

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establishes good reason for not raising the issue sooner. (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.)

around the corner from the house, and then watching the house from across the street all constitutes watching and waiting. That evidence supports the jury's implied finding that defendant watched the victim's house for a "period not insubstantial" (*People v. Edwards* (1991) 54 Cal.3d 787, 823) before he chose to cross the street, enter the house, and kill the victim.

B. Witness Killing

To establish the witness killing special circumstance set out in Penal Code section 190.2, subdivision (a)(10) the evidence must show "[t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness . . . ." "The words of subdivision (a)(10) contemplate that it is an accused's subjective intent that is relevant in establishing a special circumstance finding under that statute. Subdivision (a)(10) renders a killing capital when the witness was intentionally killed 'for the *purpose* of preventing his testimony in any criminal proceeding . . . .'" (*People v. Weidert* (1985) 39 Cal.3d 836, 853.)

The evidence presented at trial shows that Mary Schultz was present when defendant threatened to kill Daniel Ammerman if he testified against defendant on the felony assault charge the district attorney filed after defendant assaulted Ammerman's father. Defendant's threat against Ammerman is a crime. (See Pen. Code, § 136.1, subd. (a)(2).) According to Byrne, Martinez, and Kespert, as they were driving away from

Schultz's house, defendant said, "I killed that bitch," and she was not going to be talking. The jury could reasonably infer from the noted evidence that defendant killed Schultz to keep her from testifying about defendant's threat against Daniel Ammerman.

5.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends he was denied the effective assistance of counsel because his trial attorney failed to investigate defendant's alibi and also failed to present evidence that a hair found on the victim did not match the victim or defendant. We conclude defendant's claim is meritless for reasons we now explain.

In order to establish a claim of ineffective assistance of counsel, defendant must "demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis, supra*, 17 Cal.4th at pp. 540-541, citing, among other cases, *Strickland v. Washington, supra*, 466 U.S. 668.) In evaluating counsel's actions at trial, "A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] Thus, a defendant must overcome the presumption that the challenged action might be considered

sound trial strategy under the circumstances. [Citation.]" (*People v. Dennis*, *supra*, at p. 451.)

A. Hair Evidence

In his motion for new trial, defendant argued that his trial attorney was ineffective because he did not present evidence that testing of a hair recovered from the victim's body revealed that the hair did not belong to the victim or to defendant. Defendant argued that the evidence was pertinent to his defense claim that he was not the person who killed Mary Schultz. When asked at the hearing on defendant's new trial motion why he had not presented the hair evidence, defendant's trial attorney explained that there was other evidence presented at trial to show that people other than defendant were in the bedroom with the victim just before she was killed, and that he "certainly argued" in closing that one of them was the killer.

Defendant has not demonstrated deficient performance on the part of his trial attorney. The evidence in question was cumulative to other evidence presented at trial that clearly showed defendant was not the only person in the bedroom with the victim immediately before she was stabbed to death. Defendant has not demonstrated that an attorney's failure to present cumulative evidence constitutes deficient performance i.e., that it falls below an objective standard of reasonableness under prevailing professional norms. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 540.) Trial counsel argued that other people were in the room when Schultz was killed and therefore defendant was not the killer. The evidence presented at trial also included the fact that many other people were

in the bedroom after Schultz was killed. As the Attorney General points out, the hair on the victim could have been left by the paramedics, a law enforcement officer, Ammerman, or his father, all of whom had attempted to revive Schultz after she was stabbed. Because the hair evidence was not the only or even the best evidence to support his defense that someone else killed Mary Schultz, defendant cannot demonstrate that his trial attorney was deficient for failing to present that evidence. In short, we conclude defendant has not met his burden to demonstrate this aspect of his ineffective assistance of counsel claim.

B. Alibi Evidence

Defendant also argued in his motion for new trial that defense counsel was ineffective because he failed to locate defendant's purported alibi witness, and therefore failed to properly investigate defendant's alibi defense. On this issue, defendant's trial attorney explained at the hearing on defendant's new trial motion that he knew about the purported alibi witness. Dan Braun, the defense investigator, had not been able to locate the witness even after going to the bar where defendant claimed he and the witness had met.

At the new trial hearing, defendant did not call Mr. Braun as a witness or present any other evidence that refuted trial counsel's explanation. Instead defendant claims on appeal that trial counsel's testimony was vague in that it did not disclose clearly whether the investigator's attempt to locate the purported alibi witness occurred in connection with defendant's first trial or his second trial. The problem with this argument is that

defendant cross-examined defense counsel and therefore had the opportunity to obtain clarification if he believed the testimony was unclear. Defendant did not ask trial counsel any questions about the alibi witness. Consequently, if trial counsel's responses are vague it is because defendant did not obtain clarification during cross-examination. In any event, defendant simply has failed to show that trial counsel's representation was deficient.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ King
J.